

2000

State of Utah v. Joey Luis Silva : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,)	
)	Case No. 990331-CA
Plaintiff / Appellee,)	
)	
v.)	
)	PRIORITY NO. 2
JOEY LUIS SILVA,)	
)	
Defendant / Appellant.)	ORAL ARGUMENT GRANTED

REPLY BRIEF OF APPELLANT

Appeal from the Judgment of conviction of Communications Fraud, a second degree felony, in violation of Utah Code Ann. § 76-10-1801, and Attempted Escape, a class A misdemeanor, in violation of Utah Code Ann. § 76-8-309, which was entered on March 17, 1999, in the Second District Court, Davis County, the Honorable Darwin C. Hansen presiding.

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STATUTES CITED

None.

RULES CITED

None.

DETERMINATIVE AUTHORITY

See cases, etc., cited abovein passim

ARGUMENT

I. THE APPLICABILITY OF THE DUE PROCESS ANALYSIS UTILIZED BY THE TRIAL COURT TO DETERMINE THE ADMISSIBILITY OF THE VOICE IDENTIFICATION TESTIMONY IN THIS CASE IS SUPPORTED BY CASE LAW FROM OTHER JURISDICTIONS.

The State, except for the citations stealthily set forth in footnote 2 of its Brief, would have the Court believe that the due process analysis utilized by the trial court in the instant case borders on the extreme and ridiculous. See Brief of Appellee, pp. 10-15. Nevertheless, several federal circuits have held that voice identifications, like other forms of identification, should be subject to a due process analysis to ensure that the identification was not unduly suggestive. See *United States v. Alvarez*, 860 F.2d 801, 810 (7th Cir. 1988) (citing *Israel v. Odom*, 521 F.2d 1370, 1374-75 (7th Cir. 1975); *United States v. Patton*, 721 F.2d 159, 162-63 (6th Cir. 1983); *United States v. Schultz*, 698 F.2d 365, 367-68 (8th Cir. 1983); *United States v. Pheaster*, 544 F.2d 353, 369 (9th Cir. 1976), cert. denied, 429 U.S. 1099, 97 S.Ct. 1118 (1977).¹

¹In *United States v. Pheaster*, 544 F.2d 353 (9th Cir. 1976), cert. denied, 429 U.S. 1099, 97 S.Ct. 1118 (1977), the United States Court of Appeals for the Ninth Circuit held, "Because the possibility of 'irreparable misidentification' is as great when the identification is from a tape-recording as when it is from a photograph or a line-up, we hold that the same due process protection should apply to either method." *Id.* at 369.

The applicability of a due process analysis like that set forth in *State v. Ramirez*, 817 P.2d 774, 778-82 (Utah 1991), is further supported by prior Utah Supreme Court case law. In *State v. Karas*, 43 Utah 506, 136 P. 788 (1913), the Utah Supreme Court reasoned that when a conviction is sought on voice identification testimony alone, the voice identification testimony, to be sufficient, "should be something more than the mere belief, or best judgment, or mere opinion of the witness" *Id.* at 511; 136 P. at 790. Moreover, in *State v. Booker*, 709 P.2d 342 (Utah 1905), the Utah Supreme Court, in the course of citing *Karas*, stated that under the circumstances of that case, "a voice identification alone is considered insufficient to support a conviction unless shown to be *especially reliable*." *Id.* at 345. (Emphasis added).²

II. THE TRIAL COURT, IN THE COURSE OF ITS DUE PROCESS ANALYSIS CONCERNING THE ADMISSIBILITY OF THE VOICE IDENTIFICATION TESTIMONY, ERRED BY ADMITTING SUCH TESTIMONY BECAUSE THE PRETRIAL VOICE IDENTIFICATION BY SUBSTANTIALLY ALL OF THE WITNESSES IN THE INSTANT CASE WAS UNDULY SUGGESTIVE IN VIOLATION OF DEFENDANT'S DUE PROCESS RIGHTS.

The State argues that Defendant lumps all of the voice identification witnesses together in the course of arguing the

²The trial court's utilization of the due process analysis in the instant case was not only not objected to but endorsed by both the State and the Defendant, as parties.

"suggestibility of the voice identifications." See Brief of Appellee, p. 18. If, for purposes of argument, Mr. Silva indeed "lumped" all of the witnesses together as the State argues, which he did not, he did so only to the extent that the State, in the course of its pretrial identification procedure, impermissibly suggested that Mr. Silva's voice was that which was on the tapes utilized as evidence at trial.³

Shortly before trial in the instant case, Detective Bremmer, as the investigating officer, held a conference in the Davis County Attorney's Office during which numerous witnesses, who were subsequently utilized at trial, listened together to various tapes that contained conversations purportedly including Mr. Silva (See, e.g., R. 172, Trial Transcript, Vol. II, pp. 438-39).

One the individuals, Officer John Carter, testified at trial on cross-examination that Detective Bremmer asked the individuals, in unison, whether they could identify the voice on the tapes as that of *Joey Silva* (See, e.g., *id.* at R. 172, p. 441, lines 16-25). As the tapes played, many of those at the conference made verbal comments and nodded their heads, affirming that the voice on the tapes was that of Mr. Silva (See *id.* at R. 172, pp. 443-444).

³Contrary to the State's "lumped together" assertion, Mr. Silva, on pages 21-23 of his Brief, outlines in detail the impermissibly-suggestive basis of the individual voice identification witnesses.

Detective John Fielding, another voice identification witness at trial, was presented, prior to trial, with tapes by Detective Bremmer that allegedly contained the voice of Mr. Silva (*See id.* at R. 172, p. 453-454). Detective Fielding testified that the tapes presented to him for voice identification purposes contained notations on the tapes, "Conversations involving Joey Silva" (*See id.* at R. 172, p. 454, lines 1-9). Moreover, Detective Fielding essentially confirmed that the notations on the tapes suggested that the voice on the tapes was that of Mr. Silva (*See id.* at R. 172, p. 455, lines 19-23).

Officer Bob Yeaman, another voice identification witness at trial (*see, e.g., id.* at R. 172, p. 475, lines 12-15), was also present during the identification conference at the Davis County Attorney's Office (*See id.* at R. 172, p. 482-83). During his testimony outside the presence of the jury, Officer Yeaman testified that the individuals present during the conference made several unfettered unanimous comments while listening to the tapes such as, "[T]hat's Joey" (*See id.* at R. 172, p. 483-84).

In addition, Detective Lon F. Brian, who was also present during the previously mentioned conference, was utilized by the State as a voice identification witness at trial (*See R. 173, Trial Transcript, Vol. III, pp. 579-600*). During Detective Brian's testimony, which was also outside the presence of the

jury, he testified that, prior to listening to the tapes, he knew that the investigation of Detective Bremmer focused on Mr. Silva (See *id.* at R. 173, p. 509, lines 9-24).

Detective Joel Morrison, a voice identification witness, was also present at the voice-identification conference at the Davis County Attorney's Office (See *id.* at R. 173, pp. 604-08). At trial he testified to the trial court that during the conference, *which included the prosecutor* and essentially all of the law enforcement witnesses in the instant case, all of the individuals talked amongst themselves in the course of making the requested voice identification (See *id.* at R. 173, 4-16).

Based on the standards set forth in *Ramirez, Lopez, and Long*, the numerous voice identifications in the instant case were constitutionally unreliable and impermissibly suggestive. See *State v. Ramirez*, 817 P.2d 774, 781 (Utah 1991) (quoting *State v. Long*, 721 P.2d 483, 493 (Utah 1986)); *State v. Lopez*, 886 P.2d 1105, 1111 (Utah 1994) (quoting *State v. Thamer*, 777 P.2d 432, 435 (Utah 1989)). The voice identifications of essentially all of the State's witnesses at trial were tainted by the conference held in the Davis County Attorney's Office.

CONCLUSION

Based on the foregoing, as well as the arguments set forth in the previously submitted Brief of Appellant,⁴ Joey Luis Silva, respectfully requests that this Court reverse his conviction of Communications Fraud and Attempted Escape and remand the case to the trial court for a new trial and for such other relief as the Court deems just and appropriate under the circumstances presented in this case and arguments set forth herein.

RESPECTFULLY SUBMITTED this 21st day of July, 2000.

ARNOLD & WIGGINS, P.C.



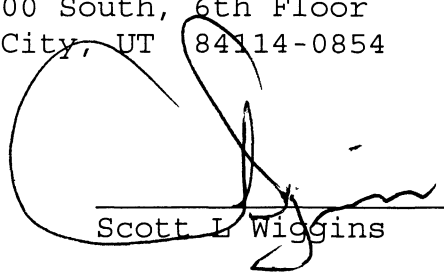
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⁴Mr. Silva incorporates the arguments set forth in the Brief of Appellant on the issues of ineffective assistance of counsel and insufficiency of the evidence inasmuch as the State failed in its Brief to sufficiently rebut those arguments.

CERTIFICATE OF SERVICE

I, SCOTT L WIGGINS, hereby certify that I personally caused to be mailed by First Class Mail, postage prepaid, two (2) true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** to the following on this 21st day of July, 2000:

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ADDENDUM

No Addendum is necessary pursuant to Utah Rule of Appellate Procedure 24(a)(11).